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No. 91-1803

Supreme Court, U.S.
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1992

# In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD A. DAVIS, TRUSTEE, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF ENERGY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS FOR THE UNITED STATES*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is untimely under Section 211(g) of the Economic Stabilization Act of 1970 because it was not filed within 30 days of the entry of judgment by the Temporary Emergency Court of Appeals.

2. Whether a claim by the Department of Energy in a bankruptcy proceeding for illegal crude oil overcharges is restitutionary in nature when some of the overcharge victims cannot be specifically identified.

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (TECA), Pet. App. 94a-98a, is reported at 950 F.2d 733. The opinion of the district court, Pet. App. 39a-49a, is reported at 4 Energy Mgmt. (CCH) ¶ 26,638. The order of the bankruptcy court, Pet. App. 1a-8a, is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 31, 1991. The petition for a writ of certiorari was filed on January 29, 1992. By letter dated February 21, 1992, the Clerk of this Court returned the petition as untimely because it was not filed within 30 days after

entry of judgment as required by Temp. Emer. Ct. App. Rule 32.[1] On May 8, 1992, petitioner filed a Motion for Reconsideration of Petition for Writ of Certiorari and argued that the petition was timely under Rule 13 of the Rules of this Court.[2] The Clerk then docketed the petition effective January 29, 1992. The jurisdiction of this Court is sought to be invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1977, Transcontinental Energy Corporation (Debtor) declared bankruptcy under Chapter 11 of the Bankruptcy Act. After Debtor was adjudicated bankrupt, petitioner was appointed trustee in the bankruptcy proceeding. Pet. App. 1a. In 1979, respondent filed a proof of claim in bankruptcy court based on illegal overcharges received by Debtor from crude oil sales. *Id.* at 2a.

Petitioner objected to respondent's claim to the extent respondent could not specifically identify the overcharge victims. Under these circumstances, petitioner asserted that the claim sounded more in the nature of a "penalty," which is disallowed under the Bankruptcy Act. Pet. App. 2a-4a. The bankruptcy court accepted that contention in part. Although the court held that respondent's "claim is a claim for restitution which may not be disallowed as

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[1] Temporary Emer. Ct. App. Rule 32 provides:

> Section 211(G) of the Economic Stabilization Act, as amended, provides "Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States."

[2] Supreme Court Rule 13.1 provides in relevant part:

> A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by * * * a United States court of appeals * * * shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.

a penalty," *id.* at 5a, it nevertheless held that the claim must be subordinated to other unsecured claims to the extent respondent could not identify the overcharge victims. *Id.* at 6a.

2. The district court reversed. It determined, as had the bankruptcy court, that respondent's claim was for restitution. Pet. App. 47a, citing *Department of Energy* v. *West Texas Marketing Corp.*, 763 F.2d 1411 (Temp. Emer. Ct. App. 1985). But the court also found that the bankruptcy court had erred as a matter of law in subordinating respondent's claim "to the extent that [respondent] was unable to specifically identify overcharge victims." Pet. App. 49a. The court explained that the bankruptcy court's dissatisfaction with "the effectiveness of [respondent] in distributing funds collected to the actual parties who were overcharged cannot change the restitutionary character of [respondent's] claim." *Id.* at 44a, quoting *West Texas Marketing Corp.*, 763 F.2d at 1426.[3]

3. Petitioner appealed to the Ninth Circuit. Respondent moved to transfer the case to the TECA. Concluding that the TECA has exclusive jurisdiction, the Ninth Circuit transferred the appeal. Pet. App. 92a-93a.

After briefing, the Chief Judge of the TECA put the case on the summary calendar. Pet. App. 95a n.1. On

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[3] The government reimburses unidentified overcharge victims indirectly by distributing the overcharges to the treasuries of the affected state and federal governments. Such indirect restitution is required in crude oil overcharge cases because, under respondent's "Entitlements Program," the cost of all crude oil, including overcharges, is effectively spread among all refiners and ultimately to all purchasers of refined petroleum products in the United States. See *United States* v. *Exxon Corp.*, 773 F.2d 1240, 1274, 1280-1286 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986); *In re Seneca Oil Co.*, 906 F.2d 1445, 1456 (10th Cir. 1990).

October 31, 1991, the court unanimously affirmed in a per curiam opinion. *Id.* at 94a-98a. The court explained that "[t]his appeal revisits, with a little change of scenery, the central issue decided in" *Department of Energy* v. *West Texas Marketing Corp.*, *supra*. Pet. App. 95a. After summarizing the facts, the court reaffirmed that under *West Texas Marketing Corp.*, respondent's claim is restitutionary, is not properly treated as a penalty, and is not subject to subordination to the claims of other creditors simply because respondent is unable to identify certain of the overcharge victims. *Id.* at 96a-97a. The court noted that its analysis is fully consistent with the conclusion of the Tenth Circuit in *In re Seneca Oil Co.*, 906 F.2d 1445 (1990).

## ARGUMENT

1. Although TECA's judgment was entered on October 31, 1991, the petition for a writ of certiorari was not filed until January 29, 1992. Because petitioner failed to file the petition within 30 days after entry of TECA's judgment as required by Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1976), as incorporated in Temp. Emer. Ct. App. Rule 32, the petition in this case is jurisdictionally out of time.

Petitioner contends (Petitioner's Motion for Reconsideration of Petition for Writ of Certiorari at 2-3 (May 8, 1992)) that litigants may disregard the 30-day limit in Temp. Emer. Ct. App. Rule 32 because the limit is merely precatory, as the rule provides that a petition for a writ of certiorari "may" be filed within 30 days after entry of the TECA judgment. Petitioner asserts that the petition in this case is timely pursuant to Supreme Court Rule 13.1, which provides that a petition for a writ of certiorari to review a judgment in a civil case "shall be deemed in time when it is filed * * * within 90 days after the entry of judgment."

That contention lacks merit. Congress enacted a variety of measures designed to expedite legal proceedings under the ESA. Congress not only created the TECA as a separate court of appeals to resolve disputes arising under the ESA, it shortened the time for filing notices of appeal to that court from 60 to 30 days.[4] Congress also shortened the time for filing a petition for a writ of certiorari to the TECA in this Court from 90 to 30 days:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code.

ESA § 211(g), Pub. L. No. 91-379, 84 Stat. 799, as amended by Pub. L. No. 92-210, 85 Stat. 743 (12 U.S.C. 1904 note (1976)).

This Court has recognized that the 30-day limit established by Congress for seeking certiorari from TECA judgments is "jurisdictional" and "obviously directed at expediting review." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 246 n.1 (1982) (per curiam); see also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 303 (6th ed. 1986). Because petitioner failed to comply with the applicable time limit for seeking certiorari, this Court lacks jurisdiction over the petition. *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412 (1943) (per curiam); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

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[4] See ESA § 211(e)(2), 84 Stat. 800 (12 U.S.C. 1904 note (1976)), incorporated by reference in the Emergency Petroleum Allocation Act, 15 U.S.C. 754(a) (1976); Temp. Emer. Ct. App. R. 15(a). See also Temp. Emer. Ct. App. R. 3 Historical Notes.

Even if the 30-day limit were deemed not to be jurisdictional,[5] petitioner's late filing is not justified in this case. Petitioner's attorney failed to comply with the 30-day limit because he "decided to exercise his discretion pursuant to [TECA Rule 32] to file the writ of certiorari according to Supreme Court Rule 13." See Affidavit of Timothy S. Cory at 1, Attached to Petitioner's Motion For Reconsideration Of Petition For Writ Of Certiorari (May 8, 1992). Petitioner's decision to proceed in that fashion, rather than to comply with applicable time limits, does not warrant departure from the time limit established by Congress.

2. In any event, the TECA's per curiam affirmance of the district court's judgment does not warrant further review. Petitioner asserts (Pet. 6-7) that the district court and the TECA erred in failing to defer to the bankruptcy court's factual finding that respondent's claim constitutes a penalty to the extent that specific victims cannot be identified. Even if that were true, it would raise at most a fact-specific claim that is not worthy of this Court's attention.

Contrary to petitioner's contention, however, this is not a case where the reviewing courts improperly substituted their views of the facts for that of the bankruptcy court. Rather, the district court and the TECA correctly applied governing legal standards, as to which there is no conflict, and held, as a matter of law, that respondent's full claim is for restitution despite the fact that respondent cannot identify all the overcharge

[5] When a time limit is jurisdictional, it may not be waived because of extenuating circumstances. See, *e.g.*, *Deal* v. *Cincinnati Board of Education*, 402 U.S. 962 (1971) (untimely petition denied where delay was attributed to airline losing all the papers); *Teague* v. *Regional Commissioner of Customs*, 394 U.S. 977 (1969) (untimely petition denied where delay attributed to postal delay caused by unforeseeable snowstorm).



victims. See *Department of Energy* v. *West Texas Marketing Corp.*, 763 F.2d 1411, 1426 (Temp. Emer. Ct. App. 1985) (holding that overcharge claims by the Department of Energy (DOE) in a bankruptcy proceeding were restitutionary despite the fact that DOE could not specifically identify the overcharge victims); see also *In re Seneca Oil Co.*, 906 F.2d 1445, 1455 n.14 (10th Cir. 1990) (claim by DOE for recovery of crude oil overcharges in a bankruptcy proceeding was restitution).[6] As the court explained in *Seneca Oil*, although the money sought by DOE may not go directly to all the overcharged purchasers, DOE nevertheless seeks the money on their behalf, and Congress intended this type of recovery to be restitution (*id.* at 1456):

> Under the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. §§ 4501 *et seq.*, the DOE is obligated to attempt to identify and compensate overcharged purchasers. 15 U.S.C. § 4502(b). Any remaining funds are then to be distributed as "indirect restitution" to states for energy conservation programs and to the Federal treasury. 15 U.S.C. §§ 4502(d), 4503. Clearly, Congress, in enacting the PODRA, envisioned that the DOE's recovery for overcharges was restitutionary in nature.

Because that characterization of DOE's objective and Congress's plan for distribution of the funds is plainly

[6] The TECA and the Tenth Circuit disagree regarding the exclusivity of the TECA's jurisdiction in this type of case. In this case, the Ninth Circuit held, correctly in our view, that the TECA has exclusive jurisdiction. Pet. App. 93a. This case does not present an appropriate opportunity to resolve the jurisdictional issue, however, because petitioner did not raise it in the TECA, *id.* at 97a n.3 ("[o]ur jurisdiction in the present case is not questioned by either party"), nor does he raise it in this Court. See Pet. i.

correct, and because there is no conflict on this issue, further review is unwarranted.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner asserts (Pet. 8) that "this Court must determine whether Section 57(j) of the Bankruptcy Act applied in the instant case or the new version 11 U.S.C. Section 726(a)(4)." That claim lacks merit. First, petitioner failed to raise that issue on appeal and is therefore precluded from raising it here. Second, the TECA and the district court correctly held that the difference between the two provisions is "immaterial". Pet. App. 95a n.2.